

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOB A DISTRICT REGISTRY**

**AT BUKOBA**

**LAND APPEAL NO. 58 OF 2019**

*(Arising from Land case NO. 34 OF 2012, DLHT for Kagera at Bukoba)*

- 1. JAMALI MUSTAFA.....1<sup>ST</sup> APPELLANT**  
**2. PROJEST MUTASHOBYA.....2<sup>ND</sup> APPELLANT**  
**3. MUSWADIKU H. KIGWA.....3<sup>RD</sup> APPELLANT**

**VERSUS**

- 1. KINYATTA TINDAMANYILE.....1<sup>ST</sup> RESPONDENT**  
**2. ALLI CHAMANI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**03/12/2021 & 08/12/2021**

**NGIGWANA, J.**

This is an appeal from the judgment and decree of the District Land and Housing tribunal for Kagera at Bukoba (The DLHT) in Land Case No. 34 of 2012 delivered on 23<sup>rd</sup> day September, 2019 in favor of the respondents. The appellants being aggrieved by the findings and decision of the DLHT, have lodged this appeal.

The brief back ground of this matter according to the record goes thus; It is alleged that in 2006, the 1<sup>st</sup> appellant Jamali Mustapha trespassed into the land of the respondents and started to erect buildings. The respondents alleged that they own the suit land under deemed right of occupancy after purchasing it from the late Abdala Kamugisha, while on

the other hand, it is alleged that the appellants together with other 29 people were allocated suit land by Bukoba Municipal council. As a result, the respondents Kinyata Tindamanyile and Alli Chamani initiated proceedings before the DLHT for Kagera at Bukoba against the appellants and other 30 people for encroachment. The case was registered as Land Case No. 34 of 2012. The tribunal decided it in favor of the respondents.

Aggrieved by that decision, the appellants are now appealing against the impugned judgment. The amended memorandum of appeal drawn and filed by Samwel Angelo, learned advocate for the appellants had four (4) grounds of appeal as here under;

1. That the respondents' purchase agreement was improperly into court proceedings.
2. That the trial tribunal erred in law to decide upon the rights of the parties without any aid from the gentle assessors.
3. That the trial tribunal erred in law to give judgment in favour of the respondents whom never proved their case as compared with the Appellant.
4. That the trial tribunal erred in law to re-hear and decide upon ownership of Plot No. 210 Block "A", Kyabitembe, Nshambya as it was Res-judicata to it.

Owing to the herein above grounds of appeal, the appellants urged this court to give orders and reliefs as follows: -

- (a) An order that the appellants are lawful owners of the disputed land by virtue of granted right of occupancy.

- (b) An order that the respondents were encroachers over the disputed land.
- (c) An order that it was wrong to re-hear and decide upon ownership of Plot No. 210 Block "A".
- (d) Costs for this appeal.
- (e) Any other relief this court may deem reasonable to grant the respondents resisted the appeal at hand.

When the appeal was called on for hearing, the appellants had the legal services of Mr. Samwel Angelo, learned Advocate while the respondents appeared in person without any legal representation. Before commencing the hearing, the learned counsel for the appellants prayed to abandon the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, and informed the court that he will only amplify on the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal. The prayer was duly granted.

This appeal was argued orally, however, when the court posed to compose the judgment, it discovered three issues which had not been addressed by the parties, **One**, whether it was proper to withdraw the 1<sup>st</sup> respondent Bukoba Municipal Council on the ground that she was not a necessary party to the case. **Two**, whether the Successor Magistrate had jurisdiction to grant the prayer which was initially made before his predecessor, and the predecessor determined it in its finality, and **three**, whether the reasons given for the non-involvement of assessors to the finality of the case were sufficient.

It has to be noted that these issues were not raised as grounds of appeal. Since it is trite in our adversary system of administration of justice

where the Judge or Magistrate is as at all time expected to play the role of unbiased umpire, he/she cannot raise any issue **suo motu** and proceed to decide the matter on the said issue without hearing the parties. As to what procedure should be adopted where the issue has been discovered at the time of composing the judgment, I sought guidance from the cases of **Zaid Sozy Mziba versus The Director of Broad Casting Radio Tanzania Oms and Another**, CAT, Civil Appeal No.4 of 2001 and **Pan Construction Company and Another versus Chawe Transport Import and Export Co. Ltd** Civil Reference No.20 of 2006 CAT (Both unreported), where the court emphasized that where in the course of composing its decision a court discovers an important issue that was not addresses by the parties at the time of hearing , it is duty bound to reopen the proceedings and invite the parties to address it on the issues.

Mr. Samwel Angelo, learned advocate for the appellants submitted that since the prayer to withdraw the 1<sup>st</sup> respondent was rejected by the predecessor Chairman, the Successor had no jurisdiction to entertain the same prayer which was heard and determined in its finality, because that offends the principle of **functus officio**. He further argued that, if the 2<sup>nd</sup> applicant (now 2<sup>nd</sup> respondent) was aggrieved by the rejection order, he would have lodged an appeal to the High Court to challenge the same. He also stated that, the Successor Chairman withdrew the 1<sup>st</sup> respondent in her absence, thus she was not afforded an opportunity to be heard before the grant of the prayer. As regard to the issue of assessors, he stated that, the Chairman gave no good reasons as to what really prevented assessors'

attendance before invoking section 23 of the Land Disputes Courts Act, Cap 216 R: E 2019. He ended his submission by submitting that, with such major irregularities, there is no way such proceedings, judgment and orders thereto can stand.

The 2<sup>nd</sup> respondent, Alli Chamani conceded that, there are procedural irregularities committed by the trial tribunal but added that, they are curable under section 45 of the Land Disputes Courts Act, Cap.216 R: E 2019, because the order withdrawing the Bukoba Municipal Council did not affect the merits of the case. He further stated that the non-joinder of the parties should not defeat the suit if resolved without affecting the third party's interests. He made reference to the case of Abdi **Kipoto versus Chief Arthur Mtoi, Civil Appeal No.75 of 2017-CAT** (Unreported). Alli Chamani further submitted that, if it appears to this court that the irregularities were incurable, the best remedy is to remit back the case file to the trial tribunal for the trial to proceed from where the Predecessor Chairman ended. As regards the issue of assessors, he stated that, section 23 of the Land Disputes Courts Act, Cap 216 R: E 2019 allows the Chairman to proceed in absence of assessors.

Now, the issue before me is to determine whether the pointed-out irregularity/irregularities suffice to vitiate the court proceedings.

It is well settled principle of law that basically it is for the plaintiff in the suit to identify the parties against whom he has any grievance and to implead them as defendants/ respondents in the suit filed for necessary relief. It follows therefore that the plaintiff/applicant being a person whom

a suit belongs (**Dominus litis**) cannot be compelled to face litigations with the persons against whom he has no grievance. Order 1 rule 10 (2) of the Civil Procedure Code Cap 33 R: E 2019 provides;

*"The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out; and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added"*

The said provision makes it clear that a court may, at any stage of the proceedings, either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

In the case at hand, the trial tribunal records revealed that, issues were framed on 28/04/2014 in the presence Mr. Buntuntu, Solicitor who represented Bukoba Municipal Council, but also in the presence the 1<sup>st</sup> respondents Land Officer. The claims by the Applicants were read over to

the respondents by the Tribunal, where the Land Officer namely Geoffrey Mwamsojo made this reply;

*"I know the area in dispute and we surveyed it from 1998 – 2003, and it is true that we allocated the 2<sup>nd</sup> -33 respondents. It is not true that the applicants purchased it in 1998. We deny the allegation that the area in dispute belongs to them".*

**The order of the tribunal read;**

*"It is admitted by the Principal Officer of the first respondent that he surveyed the area in dispute and later allocated to the 2<sup>nd</sup> to 33<sup>rd</sup> Respondents. However, he denies the applicants' claim that the suit land belongs to them. Now let the issues be framed with regard who is the lawful owner of the suit land'*

***Sgd: L. R. Chenya***

***Chairman***

***28/08/2014***

**Issues: -**

- 1. Whether the Applicants owned the disputed land under deemed right of occupancy.*
- 2. Whether the sale agreement was lawful.*
- 3. Whether the 1<sup>st</sup> respondent legally allocated the suit land to other respondents.*
- 4. what reliefs are the parties entitled to.*

***Sgd: L. R. Chenya***

***Chairman***

***28/08/2014.***

*The 2<sup>nd</sup> respondent who was the 2<sup>nd</sup> applicant in the trial tribunal, on 20/09/2016 through advocate Kayoza made an oral application before R.E Assey (Chairman) and two assessors; Anamery and Bwahama to amend the pleadings in order to remove the 1<sup>st</sup> respondent from the case on allegation that she was not a necessary party, **but trial tribunal exercised its discretion and rejected the prayer.** The order read;*

***Tribunal: The prayer is not granted***

***Sgd. R. E. Assey***

***Chairman***

***20/09/2016***

There was no appeal or revision preferred by the 2<sup>nd</sup> respondent against the herein above order.

Again, on **13/12/2017**, in the absence all respondents, the same person; Alli chamani made an oral prayer for the second time to withdraw the first respondent Bukoba Municipal Council on the same ground that she was not a necessary party. The same tribunal granted the prayer. Let the record speak for itself;

***Advocate Chamani:***

*We pray to withdraw the 1<sup>st</sup> Respondent, Bukoba Municipal Council, she is not a necessary party. This was decided in the case of **MAGDALENA***



***DANIEL VS GODWIN TABULA, Land Case Appeal No. 37 of 2013  
Bukoba Registry at page 9 of the typed judgment”.***

***Order: The 1<sup>st</sup> Respondent withdrawn from the case.***

***Sgd: E. Mogesa***

***Chairman***

***13/12/2017***

It is the finding of this court that, since and oral application was made to amend the pleadings to remove the 1<sup>st</sup> respondent from the case and the tribunal determined it by rejecting the prayer, the tribunal had no jurisdiction entertain the same prayer for the 2<sup>nd</sup> time because the act offends the doctrine of **functus officio**. In other words, the order by the Successor Chairman Mr. Mogesa was a nullity. In the case of **Bibi Kisoko Medard versus Minister for Lands and Housing and Urban Development and Another** [1983] TLR 250 it was held that;

*"In a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio"*

However, it has to be noted that where clerical or arithmetical mistakes in a judgment, decree or orders, or errors arising therein from any accidental slip or omission, may at any time, be corrected by the court either on its own motion or on the application of any of the parties. This is the exception to the general rule of functus officio. The law therefore allows

correction of the judgment, decree or order but not its merits. The situation was different in the case at hand because the successor Chairman gave a different order from that which was given by his predecessor. His action offended the rule of *functus officio*; therefore, the order was nothing but a nullity.

**It should therefore be noted that, where the Chairman or judicial officer has heard an oral or written application made by any of the parties to the case, and thereby making of an order granting or rejecting the prayer, he is *functus officio* and neither he nor any other Chairman of equal jurisdiction has jurisdiction to vary the terms of such order.**

In the case at hand, it was even worse because, 1<sup>st</sup> respondent was withdrawn from the case without being given right to be heard as to whether she had any objection to the prayer or not. This was contrary to principle of fair trial which is fundamental principle in the administration of justice.

It is undisputed that the Bukoba Municipal Council was withdrawn on the ground that she was not a necessary party to the case however, issues which were considered and determined by the trial tribunal were framed under the aid of Solicitor for Bukoba Municipal Council, and even the withdrawal of Bukoba Municipal, the issues remained the same.

Bukoba Municipal Council as indicated earlier, had shown clearly interest in this case at the stage of framing issues where the Land Officer stated that Bukoba Municipal Council had allocated land to 2<sup>nd</sup> up to 33<sup>rd</sup> respondents,

and therefore, had it not been the 1<sup>st</sup> respondent, the rest of the respondents would not have been allocated the disputed land. Issue No.3 also evidence that Bukoba Municipal Council was interested in the matter.

In the case of **Kasturi versus Uyyamperumal and Others (2005) 6 SCC 733** the Apex Court of India observed that;

*"It is now clear that two tests are to be satisfied for determining who is a necessary party. Tests are-(1) **there must be a right to some relief against such party in respect of the controversies involved in the proceedings** (2) **no effective decree can be passed in the absence of such part**".*

The Court of Appeal of Tanzania in the case of **Abdullatif Mohamed Osman versus Mhboo Yusuf Osman and Another, Civil Revision No.6 of 2017** addressing the question of a necessary party had this to say

*".....upon reason and prudence there is no gainsaying the fact that the presence of a necessary party is, just as well as imperatively required in our jurisprudence to enable the courts to adjudicate and pass the effective and complete decrees .....in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass a decree which would be of no practical utility to the plaintiff."*

The records further revealed that, 89 days after pronouncement of the tribunal judgment in Land Application No.34 of 2012, Bukoba Municipal Council, lodged revision application which was registered as Land Case Revision No.11 of 2019, but the same was dismissed on 19<sup>th</sup> day of July

2021 for being filed out of time. Paragraphs 3 and 4 of the affidavits which was supporting the application was coached in these words;

- 3. That, on 23<sup>rd</sup> September, 2019 the Trial tribunal delivered a judgment and decree which badly affected the applicant's interests and her right of being heard contrary to the law.*
- 4. That, the applicant is aggrieved by the said judgment and decree of the trial tribunal hence this application.*

Reading the reply made by Land Officer for Bukoba Municipal Council that the suit land was surveyed in 1998 -2003 and, and on the other hand, the claim by the applicants, now respondents, that they had purchased the disputed land in 1998, but also considering how the 3<sup>rd</sup> issue was framed, and the fact that the 1<sup>st</sup> respondent had never raised any objection that she was wrongly joined in the land case, and since Land Officer on the date when the issues were framed informed the tribunal that the land was allocated to all 32 respondents by Bukoba Municipal Council, and having considered the nature of the case, the applicable law as earlier stated, and the steps taken by Bukoba Municipal Council after becoming aware of the tribunal judgment, I am satisfied that the 1<sup>st</sup> respondent was a necessary party in this case.

Coming to the issue of Assessors; the proceedings of the trial tribunal revealed that the chairman sat with the aid of three assessors Ms. Fortunata, Mr. Muyaga and Rutabanzibwa at different occasions when heard the evidence of PW1, PW2 PW3, PW4, DW1 and DW2.

On 17/03/2019 when DW3 appeared to testify, the court proceeded without assessors; let the record speak for itself;

***"Mr. Muyaga, the remaining assessor is also absent today. The case shall proceed in the absence of Mr. Muyaga, tribunal assessor."***

It is not indicated as to what happened to all three assessors whether they were sick, whether their tenure elapsed or whether they had any genuine reason which prevented them/him not to appear. Only DW3 and DW4 were heard in absence of any assessor. In his judgment the chairman simply stated that;

***" In this case there will be no assessor's opinion as Fotunata, Rutabanzibwa and H. Muyaga were absent with no notice therefore the case proceeded in their absence".***

**Section 23** (1) of the Land Disputes Courts Act Cap 216 R: E 2019 provides that;

*"The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors"*

Subsection (2) provides that;

*"The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment"*

Subsection (3) states;

***"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence"***

As correctly stated by both council, sub section 3 here in above gives the Chairman the **discretion** to proceed in absence of one of the assessors or both of them. However, it should be noted that every discretion has to be exercised judiciously. The Hon. Chairman ought to have shown steps taken by the tribunal to procure attendance of the assessor/assessors. It is not enough just to state that they have entered no appearance with no notice since, Assessors are there not by accident, they constitute the composition of the tribunal, therefore, their absence should not be taken lightly.

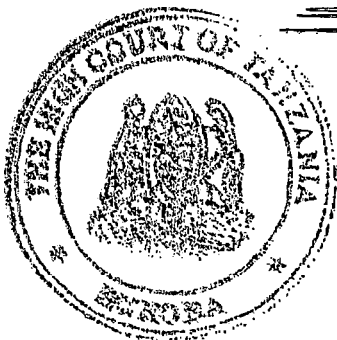
It is my considered view that, before making a decision to proceed in absence of assessors, sufficient cause for their absence must be stated by the honorable Chairman/Chairperson, sufficient cause include; death of the assessor/assessors, expiry of their tenure, conflict of interest, and serious sickness be it physical or mental. Failure of one assessor/assessors to enter appearance in court for a single day with or without notice does not constitute a good reason to entitle the chairman or Chairperson to proceed with the matter in their absence. In the case at hand, the reason given by the Chairman was not sufficient and justifiable at all.

Chamani was of the view that the irregularities which have been noted and discussed in this case can be cured under section 45 of the Land Disputes Act, Cap 216. This court is of the different view because the case proceeded without the necessary party and the order to withdraw her was null and void ab initio, thus the necessary party was denied the right to be heard, and that is not acceptable in the proper administration of justice. In that premise, to discuss the ground of appeal will be just a mere academic exercise and wastage of time, I therefore opt not to do so.

Considering the anomalies noted in this case, the proceedings from the date; **13/12/2017 up to 20/09/2019 (From page 49-141 of the trial tribunal typed proceedings)** are hereby quashed, the judgment and orders thereto are set aside.

I therefore direct that application No.34 of 2012 should be expeditiously heard afresh before another Chairman/Chairperson and a different set of assessors. Since the anomalies were not directly caused by the parties, I make no order as to costs. It is so ordered

Dated at Bukoba this 8<sup>th</sup> Day of December, 2021.



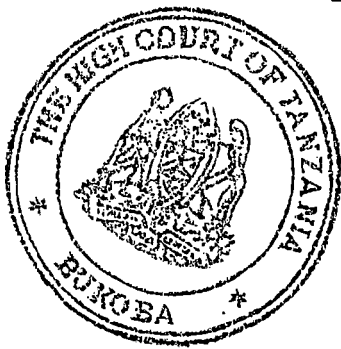
E. L. NGIGWANA

JUDGE.

08/12 /2021

Delivered this 8<sup>th</sup> day of December, 2021 in the presence of the 2<sup>nd</sup> & 3<sup>rd</sup> appellants, Advocate Samwel Angelo for the appellants, Mr. Fahad Rwamayanga for the respondents, Mr. E. M. Kamaleki, Judges' Law Assistant and Mr. Gosbert Rugaika B/C.

Right of appeal explained.



  
E. L. NGIGWANA

JUDGE.

08/12 /2021